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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN AMES BROWN,

Plaintiff,

vs.

ANDREW B. STROUD, an individual
and STROUD PRODUCTIONS AND
ENTERPRISES, INC.,

Defendants.

) Case No.: 08-CV-02348-VRW

)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF A**
) **MOTION TO DISMISS PURSUANT TO**
) **RULE 12(b)**

) Date: June 10, 2008

) Time: 2:30 p.m.

) Courtroom: 6

Honorable Vaughn R. Walker

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants ANDREW B. STROUD and STROUD PRODUCTION & ENTERPRISES, INC., (hereafter, "Stroud" or "defendants" as appropriate) respectfully move this Court to dismiss them from the present action. Primarily, the motion for dismissal is brought on the grounds that this Court lacks personal jurisdiction over the defendants. As conceded by the Complaint, defendants are citizens of New York. Further, as will be shown below, the defendants have no contacts with California. In fact, it would seem that plaintiff failed to comply with Rule 11's fundamental requirements before bringing the present suit against these defendants before this Court in this State. (Plaintiff's counsel is obligated to make a reasonable inquiry whether jurisdictional allegations are well grounded in fact and warranted by existing law. See, *Davis v. McGraw*, 1992

1 U.S. Dist. LEXIS 10737, 5-7 (N.D. Cal. 1992).).

2 Additionally, consistent with the lack of personal jurisdiction, defendants assert that this
3 Court is the improper venue for the action.¹

4 As set forth in plaintiff's exceedingly short Complaint, this action concerns the ownership
5 interest of sound recordings by the artist known as Nina Simone. Plaintiff Steven Ames Brown
6 ("Brown" or "plaintiff" as appropriate) brought the action in federal court based upon diversity
7 jurisdiction. However, plaintiff should never have brought this Complaint in this Court because
8 there is a complete absence of the requisite personal jurisdiction over the defendants. As such, this
9 Court is without the necessary power to adjudicate the matter.

10 As set forth herein and in the accompanying Declaration of Andrew B. Stroud, no
11 relationship exists between the Defendants and the forum state of California. The facts demonstrate
12 that the defendants lack the minimum contacts to meet due process requirements and therefore the
13 Court has no jurisdiction over them in the State of California. As set forth below, because this
14 Court lacks the ability to exercise either general or specific jurisdiction over the Defendants, this
15 Motion should be granted and the action against the Defendants should be dismissed.

16 II. STATEMENT OF FACTS

17 A. Plaintiff's Claim

18 Plaintiff Steven Ames Brown filed his Complaint for Declaratory Relief on May 7, 2008.
19 The Complaint concedes that the "defendants are citizens of New York." (Complaint at ¶1.) The
20 Complaint asserts that plaintiff represented Eunice K. Stroud, professionally known as Nina Simone
21 (hereinafter referred to as "Ms. Simone"), in two cases before California federal courts in 1994 and
22 1995 ("Prior Actions"). (Complaint at ¶3.) The Complaint suggests that those Prior Actions related
23 to certain sound recording by Ms. Simon. (Complaint at ¶3.) Plaintiff asserts that as a result of the
24 Prior Actions, and through dealings with Ms. Simon, he owns a 40% interest in those recordings.
25 Plaintiff fails to identify the owner of the remaining 60%. (Complaint at ¶4.) Plaintiff seeks a

26
27 ¹ Simply put, because there is no jurisdiction over the present defendants, venue is also improper for the same reasons
28 and based upon the same facts.

determination by the Court of the defendants' ownership interests in the sound recordings.

Despite his reliance on the Prior Actions as the apparent basis for jurisdiction, plaintiff admits in his Complaint that the defendants did not even know of the Prior Actions before 2000. (Complaint at ¶6.) (Presumably after the Prior Actions had been resolved.) Moreover, plaintiff's Complaint fails to disclose that the present defendants in this case were not even parties to the Prior Actions. (Declaration of Andrew B. Stroud, at ¶4.) Additionally, as set forth in defendant Stroud's Declaration, the defendants were not given notice of those lawsuits at the time, the defendants did not participate in those lawsuits, and Mr. Stroud was never deposed in those lawsuits. (Stroud Decl.at ¶4.)

In short, plaintiff's Complaint fails to either assert or much less establish any grounds for this Court to have personal jurisdiction over the defendants.

B. The Defendants Have No Contacts with the State of California

There are two named defendants in the present action. One is an individual. The other is that individual's former business, which is now dissolved. Neither defendant has contacts with California.

Defendant Andrew B. Stroud is a resident of New York. This is conceded by plaintiff's Complaint. Stroud has lived in New York continuously since 1946. (Stroud Decl.at ¶2.) He conducts no business in California. (Stroud Decl.at ¶3.) In fact, Stroud is 82 years old. He has had three major surgeries since 2004 (including open heart surgery in 2006) and therefore his health requirements and health concerns have made it extremely difficult for him to travel long distances for the past couple of years. (Stroud Decl.at ¶7.)

Plaintiff's Complaint also names Stroud Productions and Enterprises, Inc. (hereinafter referred to as "Stroud Productions") as a defendant. Stroud Productions was incorporated in 1963 and had its principal place of business and operations in the State of New York. (Stroud Decl.at ¶3.) Andrew Stroud was the sole shareholder of Stroud Productions. (Stroud Decl.at ¶3.) Stroud Productions conducted no business in California. (Stroud Decl.at ¶3.) Stroud Productions was

1 dissolved in 1981. (Stroud Decl.at ¶3.)

2 Moreover, and of further relevance to this Motion, Stroud has never owned real property in
3 California and has never had a residence in California. (Stroud Decl.at ¶2.) In short, the
4 defendants have absolutely no relationship with the State of California. As will be shown below,
5 there is no basis for asserting jurisdiction over them.

6 7 **III. LEGAL ARGUMENT**

8 **A. THE COURT MUST DISMISS PLAINTIFF'S CLAIM AGAINST THE** 9 **DEFENDANTS BECAUSE THE COURT LACKS PERSONAL** 10 **JURISDICTION OVER THE DEFENDANTS.**

11 When no applicable federal statute governs jurisdiction, a federal district court applies the
12 law of the state in which the district court is sitting. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d
13 1482, 1484 (9th Cir. 1993). California permits the exercise of personal jurisdiction to the full extent
14 permitted by the due process of law. *Rocke v. Canadian Auto. Sport Club* (9th Cir. 1981). Thus,
15 personal jurisdiction must comport with the California long-arm statute and with the constitutional
16 standards of due process. *See* Civ. Proc. Code §410.10.

17 Personal jurisdiction over non-resident defendants depends upon whether a defendant has
18 sufficient minimum contacts with the forum state or whether the traditional bases for personal
19 jurisdiction are present. The three traditional bases for exercising personal jurisdiction are service
20 within the forum state, domicile or consent. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). Absent
21 one of those traditional bases for jurisdiction, due process requires that the defendant have certain
22 minimum contacts with the forum state "such that maintenance of the suit does not offend
23 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326
24 U.S. 310 (1945) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). These requirements
25 provide "a degree of predictability to the legal system that allows potential defendants to structure
26 their primary conduct with some minimum assurance as to where that conduct will and will not
27 render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

1 Thus, the plaintiff must be able to prove sufficient “minimum contacts” between the defendant and
 2 California. Under California law, the defendant’s “contacts” with the forum state are measured
 3 only “by contacts occurring prior to the event causing the litigation.” *Farmers Ins. Exch. v. Portage*
 4 *La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990).

5 Personal jurisdiction is determined on a defendant-by-defendant basis and may be either
 6 “general” or “specific.” *Panavision International, L.P. v. Toepen*, 141 F.3d 1316, 1320 (9th Cir.
 7 1998). The touchstone with both general and specific jurisdiction is “purposeful availment” (i.e.,
 8 whether the non-resident defendant has purposefully availed himself of the forum state’s benefits or
 9 purposefully and voluntarily directed his activities toward the forum so that he should expect, by
 10 virtue of the benefits received, to be subject to a court’s jurisdiction based upon his contacts) so as
 11 to ensure that a defendant will not be haled into a jurisdiction solely as a result of random,
 12 fortuitous, or attenuated contacts or the unilateral activity of another party or third person. *Burger*
 13 *King Corp. v. Rudzewicz*, 471 U.S. 461, 471-76 (1985). “It is essential in each case that there be
 14 some act by which the defendant purposefully avails itself of the privilege of conducting activities
 15 within the forum state, thus invoking the benefits and protections of its laws.” *Hansen v. Denckla*,
 16 357 U.S. 235, 253 (1958).

17
 18 **1. Plaintiff Bears the Burden of Proof to Establish the Facts Supporting**
 19 **Jurisdiction.**

20 It is the plaintiff’s burden to establish that a district court has jurisdiction. *Doe v. Unocal*
 21 *Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). Although for purposes of a Motion to Dismiss, the
 22 plaintiff’s version of the facts is assumed to be true unless directly controverted, the plaintiff must
 23 still demonstrate facts that if true would support jurisdiction over the defendant. *Id.* In the present
 24 case, the plaintiff has failed to and cannot meet his burden of proof.

25 As set forth above, the plaintiff’s Complaint does not articulate any facts to support the
 26 conclusion that the defendants had any contact with the State of California. Moreover, the
 27 defendants are not domiciled in California, they were not served in California, nor have the

1 defendants consented to local personal jurisdiction by voluntarily appearing in this action.
 2 Furthermore, the defendants have never conducted business in this state. In fact, the defendants
 3 have no contacts with the State of California. As such, maintaining this action in this Court would
 4 greatly offend the traditional notions of fair play and substantial justice.

5 Nowhere in the Complaint does the plaintiff allege a factual basis on which this Court can
 6 properly exercise personal jurisdiction over the defendants. The Complaint makes only the legally
 7 conclusory allegation that this action “arose” in San Francisco County. (Complaint at ¶ 2.) This is
 8 incorrect. Rather, the defendants’ lack of contacts with California conclusively supports the
 9 assertion that the defendants have not “purposefully availed” themselves of the laws of California.
 10 The exercise of jurisdiction must comport with due process requirements and plaintiff’s conclusory
 11 allegation is wholly insufficient to satisfy the personal jurisdiction requirements of the Constitution
 12 and Codes of the United States and the laws of the State of California. Because the defendants have
 13 no connection to California it would be unjust for this Court to exercise personal jurisdiction over
 14 them.

15 **2. There Are Insufficient Minimum Contacts Between the Defendants and**
 16 **California to Establish General Jurisdiction.**

17 General jurisdiction exists when a non-resident defendant’s contacts are substantial or
 18 continuous and systematic with the forum state, even if those contacts are not related to the cause of
 19 action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984). The
 20 standard for establishing general jurisdiction is high, requiring contacts of the sort that approximate
 21 physical presence. *Bancroft & Masters, Inc., v. Augusta National Inc.*, 223 F.3d 1082, 1086 (9th
 22 Cir. 2000). Factors to be taken into consideration are whether the defendant makes sales, solicits or
 23 engages in business in the state, serves the state’s markets, designates an agent for service of
 24 process, holds a state license, or is incorporate in the forum state. *Id.* The assertion of general
 25 jurisdiction must be reasonable. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848,
 26 852-53 (9th Cir. 1993).

27 Based upon the same facts as set forth above, there is no basis for asserting general
 28

jurisdiction over the defendants. To recap: defendants have no contacts with the State of California. The defendants did not reside in or maintain a business office in California. Furthermore, the defendants' business was conducted within New York. Based upon the allegations set forth in the Complaint and the declaration of the defendant Stroud, filed concurrently herein, it is clear that there is no basis for exercising general jurisdiction over the defendants in the State of California. Such an assertion of jurisdiction would be unreasonable.

3. The Defendants Did Not Purposefully Avail Themselves of the Benefits and Protections of the Laws of California and Therefore, There is No Specific Jurisdiction.

In contrast to general jurisdiction, which is based upon extensive presence and activities in the forum state, specific jurisdiction exists when the cause of action arises out of certain forum-related acts by the non-resident defendant. *Helicopteros*, 466 U.S. at 415 (1984). A three-part test applies when considering whether a district court may exercise specific jurisdiction over a non-resident defendant:

- (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to defendant's forum related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003) (citations omitted).

The first part of the test for specific jurisdiction requires a qualitative evaluation of the defendant's contact with the forum state, to determine whether the non-resident defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into

1 court there. *Id.* at 1130. This first requirement is met if the defendant performed some type of
 2 affirmative conduct that allows or promotes the transaction of business within the forum state. *Id.*
 3 The second part of the test asks whether the alleged injury would not have occurred but for the non-
 4 resident defendant's forum-related conduct. *Id.* at 1131-32. Lastly, under the third part, courts
 5 apply a multi-factor test to determine whether exercising jurisdiction would be reasonable:

- 6 (1) the extent of defendants' purposeful interjection into the forum state's affairs;
- 7 (2) the burden on the defendant of defending the forum;
- 8 (3) the extent of conflict with the sovereignty of the defendants' state;
- 9 (4) the forum state's interest in adjudicating the dispute;
- 10 (5) the most efficient judicial resolution of the controversy;
- 11 (6) the importance of the forum to the Plaintiff's interest in the convenient and
- 12 effective relief; and
- 13 (7) the existence of an alternative forum.

14 *Id.* at 1132, quoting *Core-Vent Corp.*, 11 F.3d at 1487-88.

15 The facts, as alleged in plaintiff's Complaint and as set forth in Stroud's Declaration,
 16 establish that not even specific jurisdiction is present in this case. Plaintiff has not and cannot plead
 17 any facts to support the assertion that a California district court has the power to exercise specific
 18 jurisdiction over these New York defendants. In fact, it is such an open and shut case, that it is
 19 almost unnecessary to analyze the facts in the instant case with respect to each and every prong of
 20 the three-part test set forth in *Harris Rutsky*, in order to unquestionably conclude that there is no
 21 specific jurisdiction over the defendants here.

22 Nonetheless, in analyzing the facts of the present case to the first-part of the test for specific
 23 jurisdiction, the only conclusion possible is that the defendants never anticipated being haled into a
 24 California court since they did not perform any act, let alone an affirmative act, within the forum
 25 state. Secondly, the analysis need go no further than to see that there was no forum-related conduct
 26 by the defendants (and none is alleged). Therefore this claim does not arise out of any conduct by
 27 the defendants in California. Finally, under the third prong of the test, it would be unreasonable for

1 this Court to exercise jurisdiction over defendants that have had no contact with California, and in
 2 an action where adjudication of the dispute does not serve any interest of the State and an
 3 alternative proper and efficient forum exists. (See, Stroud Decl. at ¶ 5.)²

4 Plaintiff does not assert and cannot establish that the defendants availed themselves of the
 5 benefit and protection of the laws of California. Additionally, exercising jurisdiction over the
 6 defendants in California would not only be unfair but would also result in defendant Stroud bearing
 7 the excessive burden of participating in cross-country litigation at the age of 82 and while suffering
 8 from poor health. (Stroud Decl. at ¶ 7.) From these undisputed facts it is clear that the exercise of
 9 specific jurisdiction over the defendants would be unreasonable and would constitute a violation of
 10 due process requirements. The Motion should be granted and the claim against the defendants
 11 dismissed.

12 IV. CONCLUSION

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 14 There are no facts which would establish any legal basis to support personal
 15 jurisdiction in the instant case over these defendants. Therefore, this Court lacks personal
 16 jurisdiction over the defendants. The instant Motion should be granted and the claim
 17 against the defendants dismissed.

18
 19 Dated: June 5, 2008

20 WILSON, ELSER, MOSKOWITZ, EDELMAN &
 21 DICKER LLP

22 By:

23 Francis J. Torrence
 24 Attorneys for Defendants
 25 ANDREW B. STROUD and
 26 STROUD PRODUCTIONS AND
 27 ENTERPRISES, INC.

28
 26 ² As set forth in Stroud Decl. at ¶ 5, litigation already exists between the parties which is moving forward in New
 27 York. Defendants anticipate that it might be necessary to request this Court to abstain from hearing the present matter
 28 while the other litigation is moving forward, and hereby reserve their right to raise this issue in either subsequent
 briefing or at the Case Management Conference if necessary.